

**Albertson's, Inc. and United Food and Commercial Workers Union, Local 394, AFL-CIO. Cases 18-CA-13715 and 18-CA-13782**

February 20, 1997

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND HIGGINS

The issue presented in this case is whether the Respondent violated Section 8(a)(1) of the Act by disparately enforcing its no-solicitation policy, thereby assisting employees in filing a decertification petition, and by engaging in surveillance of its employees' union activities.<sup>1</sup> The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Albertson's, Inc., Rapid City, South Dakota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> On September 30, 1996, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that there are no exceptions to the finding that Sally Weaver is a supervisor.

*Joseph Bornong, Esq.*, for the General Counsel.

*Brian M. Mumaugh and Monique A. Tuttle, Esqs. (Holland & Hart)*, for the Respondent.

*Robert D. Metcalf, Esq. (Garber & Metcalf)*, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

JOHN H. WEST, Administrative Law Judge. This case was tried at Rapid City, South Dakota, on July 23 and 24, 1996, pursuant to charges filed August 9, 1995, in Case 18-CA-13715 and on October 2, 1995, in Case 18-CA-13782 and a consolidated complaint (complaint) which was issued

March 14, 1996. As here pertinent,<sup>1</sup> the complaint alleges that Albertson's, Inc.<sup>2</sup> violated Section 8(a)(1) of the National Labor Relations Act (the Act) in that it since July 18, 1995, has disparately enforced its no-solicitation policy and thereby assisted employees in filing a decertification petition by permitting antiunion solicitations by employees in violation of company rules while prohibiting prounion solicitations and by on or about September 15, 1995, engaging in surveillance of employees' union activities by confiscating prounion materials from employees and copying them. Respondent filed an answer in which it denies violating the Act as alleged.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent, a Delaware corporation, maintains a place of business in Rapid City where it has been engaged in the retail sale of groceries and general merchandise. The complaint alleges, the Respondent admits, and I find that at all times material Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and United Food and Commercial Workers Union, Local 394, AFL-CIO<sup>3</sup> is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

**A. Facts**

During all times material, Respondent had the following "SOLICITATIONS" policy (G.C. Exh. 2):

Non-employees may not solicit, distribute literature or use sound devices on Company premises at any time.

Employees who are working should not be disturbed, interrupted or disrupted by solicitations or the distribution of literature. Unauthorized presence of any employee in the non-selling areas of the store or in other non-public areas of our facility for any purpose is strictly prohibited unless the employee is on duty, preparing to come on duty, or preparing to leave after having been on duty.

No employee may engage in solicitation of any kind during working time, or while the person(s) he or she is soliciting is on working time. Further, no employee may distribute literature during working time or in working areas (note: working time does not include authorized periods of off-duty times—e.g., meal time, break time, etc.).

In the spring of 1994, David Dahl, who at the time was the night-crew chief at the involved store, talked to employ-

<sup>1</sup> Other of the allegations in the complaint were settled at the commencement of the hearing and they will not be treated further. *Jt. Exh. 1.*

<sup>2</sup> Hereinafter referred to as Respondent.

<sup>3</sup> Referred to as the Union or the Charging Party.

ees at the involved store and asked them if they were interested in joining the Union or signing a union authorization card or both. Dahl testified that he passed out the cards; that Dan Yeazel, the store director, in March 1994 told him that he, Yeazel, had heard that Dahl had been talking to people, bringing cards in the store; that Yeazel said that he knew what Dahl was up to and he, did not like it; that Yeazel said that he went through a union organizing drive 1-1/2 years before that at Respondent's Cheyenne, Wyoming store and he did not want to go through it again; and that when he asked Yeazel if it would be all right if Dahl did it off the clock on his own time and talked to employees while they were in the breakroom off the clock Yeazel said "absolutely not." Dahl also testified that during this conversation Yeazel said, "[T]hey were high on me now I go and do something like this and he said he [Yeazel] didn't know what to think." A charge, General Counsel's Exhibit 5, was filed with the National Labor Relations Board (the Board) regarding this matter. Also a charge, General Counsel's Exhibit 6, was filed with the Board when later in March 1994 Respondent reduced Dahl's hours and eliminated his time-and-a-half Saturday night hours. These matters were settled and Dahl received backpay and was given back his normal and premium pay hours. (G.C. Exh. 7.) Yeazel testified that he did have a conversation with Dahl in the sign room; that he did not threaten Dahl; and that Dahl did not say to him, "Don't do this Dan. I can't believe you are threatening me."

At some time during the summer of 1995 Randy Stewart, who at the time was third person in the involved store,<sup>4</sup> was working in the courtesy booth<sup>5</sup> when Gary Wehner, who is a cashier at the involved store, asked him to sign a decertification petition. Stewart testified that he told Wehner that he did not know if he was in the bargaining unit and Wehner would have to check with Respondent's labor relations department in Boise, Idaho, to find out if Stewart could sign the petition; that he did not know whether Wehner was supposed to be working at the time; that when he returned to the store later he saw Wehner at about "9 or 10 o'clock" and he asked him if he had found out whether Stewart could sign and Wehner said that basically anybody but salaried employees could sign; that he signed the petition; and that in affidavits he gave to the Board he indicated that he was aware that Yeazel would not like employees soliciting while they or the other employee was working, solicitation was okay only on breaktimes and in breakrooms or outside the store, and that if he saw an employee soliciting another employee in a work area he would put a stop to it. When questioned by counsel for Respondent, Stewart testified that Wehner did not interrupt any customers or employees when he first asked Stewart to sign; that when he gave his first affidavit to the Board he did not know of the specific written solicitation policy of Respondent; that he never saw Wehner in July 1995 interrupt a customer or another employee to the point where they could not do what they wanted to do while

circulating his petition;<sup>6</sup> and that he saw Tom Johnson, the union president, in the store talking to employees and Stewart never told him to stop.

On either July 21 or 22, 1995, at about 10 p.m. Wehner asked Connie Mehrer, who at the time was a customer service supervisor, to sign his decertification petition. She testified that Wehner solicited her signature late in the evening just before she was getting ready to leave from work; that at the time she was getting detail tapes out of register eight and Wehner was carrying shopping baskets over to the front door; that Wehner was not on a break; that she told Wehner that she could not sign at that time; that about 1 hour later when she was off the clock she spoke to Wehner about the petition, which at that time was on a table in the customer service area, asking him who was going to see the petition; and that she believed that when this second conversation about the petition took place Wehner was on the clock. When questioned by counsel for Respondent, Mehrer testified that when Wehner first solicited her signature there were no customers present and he did not interfere with her work or the work of any other employee at the time.

Jerray Bachman, who works for Respondent on the night-freight crew, testified that in July 1995 when he came to work one night at about 10:45 p.m. Wehner, who was standing at his check stand, asked Bachman if he would sign the decertification petition; that Wehner briefly described the petition and he said that he, Bachman, would be signing to bring back the union vote; that this conversation took a couple of minutes; that he terminated this conversation because he did not want to be late for work; that after he had been working for about 15 minutes he went back and spoke to Wehner; and that neither he nor Wehner was on a break; and that Wehner had the petition in his pocket and he signed it. On cross-examination Bachman testified that when he spoke with Wehner the second time there were no customers or other employees at Wehner's check stand; and that Dave Motorude was the supervisor in charge that night. Subsequently, Bachman testified that he saw Motorude in the customer service booth when he was talking to Wehner; and that Wehner's check stand is directly in front of the booth.

Dianne Pesek, who is a cashier at the involved store, testified that in mid-July 1995, while she was on maternity leave, she went to the involved store to purchase some groceries; that Wehner, who was working the 15-item express check-out, pulled a petition out of his pocket and asked her if she would sign it; that she had been involved in both union campaigns and she believed that she was the most obvious and vocal union supporter at Respondent; that she asked Wehner why he would pass a petition around to get the Union out when the employees were pretty close to getting a contract; that she refused to sign it; that they spoke for about 3 minutes; that it was a busy time of the afternoon about 4:30 or 5 p.m.; that Randy Stewart was in the next express line facing Wehner; that when a manager assumes the role of a cashier the store is busy; and that Stewart asked her how she and the baby were doing and when she was coming back to work. On cross-examination, Pesek testified that she could not remember if there were customers on Wehner's line

<sup>4</sup>"Third person" is a supervisory position with the individual being third in line of responsibility at the store.

<sup>5</sup>The booth is about 10 feet from the cash registers and check stands in the front of the store. It contains a safe and it is where the checkers tills are counted out. It is also used to keep track of what is happening at the front end of the store, and employees can be supervised from the booth.

<sup>6</sup>Subsequently Stewart testified that he never witnessed Wehner soliciting signatures for his decertification petition in the store, except when Wehner solicited his signature.

when he solicited her signature. She testified that she did not indicate in her Board affidavit that there were customers on Wehner's line because there were not any customers on his line.

Wehner testified that he and another checker who works in the involved store, Carmel Lefor, discussed having a decertification petition assertedly because albeit the Union won the election a contract had not been negotiated; that when he asked about decertification Yeazel gave him the telephone number of Respondent's corporate office which gave Wehner the telephone number of the Board; that the Board provided explicit instructions on what he had to do; that Christopher Yost, a labor relations representative in Respondent's labor relations department, gave him specific instructions on what had to be done, Respondent's Exhibit 3;<sup>7</sup> that there was no petition signing while he was on the clock; that he never went up to an employee while they were working and disrupted their work to get them to sign the petition; that he could not recall if customers were present while he had a conversation with someone inside the store about the petition; that he recalled talking to Mehrer about signing the petition; that Pesek did ask him why he was circulating the petition but he did not ask her to sign the petition because he knew she was "on the other side"; that he never asked an employee of Respondent to sign the petition while he, Wehner, was at his check stand with customers waiting; and that Lefor obtained about 75 percent of the signatures on the petition and he obtained the remainder. On cross-examination, Wehner testified that the affidavit he gave to the Board indicated (a) that he and Lefor each obtained 50 percent of the signatures on the petition, (b) that he was careful not to approach people that were on the clock, and (c)

[A]s for Randy Stewart I recall that he come on late one night, maybe around 11 p.m. on his own time to see about something in his department, and we got to talking about the petition and he said that he would sign it. I was on the clock at this time and I gave him the petition and I went upstairs to punch out, and when I came back downstairs he had signed the petition and gave it to me;

that there are a total of 43 signatures on the petition with the first signature dated July 18, 1995, a total of 41 of the signatures are dated July 18, 19, and 20, and 2 of the signatures are dated July 21, 1995; that he did not recall ever approaching anyone to sign the petition while he was on the clock, including Stewart; that he never carried the petition in his pocket; that he did not recall asking fellow employee Michelle Brady, who had punched out and was in Wehner's line with groceries, to sign the petition while he was checking her out; and that he did not remember talking to Jennifer Wagner while she was on the clock and asking her to sign the decertification petition.<sup>8</sup> On redirect, Wehner answered no to the following question: "[i]n your opinion, Mr. Wehner, did you violate the company's policy about solicita-

tion at any time during the circulation of the decertification petition with the knowledge of any managers or supervisors." Subsequently, Wehner testified that he did not solicit Bachman's signature on the petition; that Bachman asked him about signing the petition but they did not discuss the petition at the time; that when Bachman first asked him about signing the petition he was at the check stand but he could not recall whether he had any customers; and that Bachman did not sign the petition in his presence.

Kirk Murphy, who was Respondent's liquor store manager at the involved store, testified that in July 1995, Nancy Anderson, who is a drug general merchandise clerk at the involved store, approached him and asked him to sign a decertification petition; that this occurred about 10 or 11 a.m.; that at the time he was on the clock, waiting on customers, checking, working; that when he questioned whether he could sign the petition, Anderson told him that she had talked to Yeazel and Stewart and they said that management could sign; that he refused to sign it without first speaking with Yeazel and Stewart; that Yeazel and Stewart told him that management was allowed to sign the petition and he should take his break at that time and go out and sign it while Anderson was watching the liquor store; that he signed the petition; that he attended weekly manager meetings; that at one which was held about the time the decertification petition was circulated Yeazel said that he came from Cheyenne, they went through something like this, and Respondent kept the union out down there and it would keep the Union out of the Rapid City store also; that when Anderson approached him to talk about the petition there were customers which he was checking out and there were customers in his department making selections; and that when Anderson approached him he was behind the check stand waiting on a customer. On cross-examination, Murphy testified that he signed the petition outside of the store; and that he has retained a lawyer and it was his intent to file a lawsuit over his discharge by Respondent for allegedly "forcing vendors to stock shelves, [and] build displays, which could . . . jeopardize . . . [Respondent's] liquor license."

Yeazel testified that he never told any of his supervisors that it was okay for them to sign the decertification petition; that, specifically, he did not tell Murphy, Burke, or Mehrer that it was okay for them to sign the decertification petition; that they never asked him if it was okay for them to sign the petition; that he never said at a managers meeting that he was going to get rid of the Union; and that prior to coming to Rapid City he had never been the subject of any unfair labor practice charges filed by a union while he was a manager. On cross-examination, Yeazel testified that before coming to Rapid City he was a store director at Respondent's Cheyenne store; that the employees at the Cheyenne store are not represented by a union and they were not while he worked there; and that there were organizing campaigns while he was at the Cheyenne store. General Counsel's Exhibit 8 is a Board complaint dated October 22, 1992, in Case 27-CA-12324 wherein it is alleged, among other things, that Yeazel, at Respondent's Cheyenne store threatened Respondent's employees with tougher working conditions if they selected the Union as their bargaining representative. General Counsel's Exhibit 9, as here pertinent, is the settlement agreement regarding that case, with a nonadmission clause and a notice which includes the above-described allegation.

<sup>7</sup> The three-page letter, dated July 12, 1995, from Yost to Wehner is explicit and contains the following: "[e]mployees must circulate the petition . . . in non-working areas (i.e., break room, outside of store) during non-working time. Supervisors cannot be involved."

<sup>8</sup> Originally Wehner testified, regarding Wagner, that he "didn't talk to anybody that was union."

Sally Weaver testified that at the time of the hearing herein she had been a fourth key person for about a 1-1/2 years; that a fourth key person can be in charge of the entire store when there is no one else around; that at the time of the election she was a fifth key person and she voted in the election; that she asked Wehner as he was coming into work one evening if she could sign the decertification petition but he indicated that he did not have it with him but rather it was in his locker, which is in the breakroom; that later when she was going on a break and Wehner was checking she again asked him if she could sign the petition; that there were no customers around when she asked him the second time; and that another employee got the petition and she signed it in the drug back room.

Mehrer testified that on September 15, 1995, she just came back from lunch at about 6 p.m. to see a "commotion" at Dianne Pesek's check stand; that she asked Sally Weaver<sup>9</sup> to go see what the "commotion" was about; that she then went to another check stand to wait on customers; that Pesek had her back toward the customers on line at her check stand and there were two other employees standing at the end of her check stand; that she did not see Pesek receive a clipboard from Johnson; that she saw Cook, who was one of the employees at the end of the check stand hand Pesek a clipboard; that Weaver later told her that she took a petition away from Pesek and put it in the store safe which is located in the customer service booth; and that later that day when Pesek asked for her clipboard back she told Pesek that it was in the store safe. When questioned by counsel for Respondent, Mehrer testified that Pesek was on a 15-item express check-out; that 6 p.m. is a busy time of day because people want to check out and go home; that the two other employees who were at the end of Pesek's check stand were Todd Clauson and Kathy Cook; that she could not estimate how many customers were on Pesek's line but one of them was Tom Johnson; that she saw Cook hand the clipboard to Pesek; that some of the customers who were on Pesek's line came over to her check stand; that she opened a check stand because of what was going on at Pesek's check stand; and that the incident at Pesek's check stand took "a good 20 seconds maybe." Subsequently Mehrer testified that Cook and Clauson are baggers but she thought that the latter was supposed to be working the lobby department that night; and that it is unusual to have a bagger on the express line.

Pesek testified that Johnson gave her "a petition to get Gary [Wehner] to stop his petition"; that Johnson brought the petition to her check stand about 6 p.m. on a Friday night after she went back to work in September 1995; that earlier in the day Johnson told her that he was going to drop off the petition; that he came up behind her at the check stand and handed her the petition on a clipboard; that her line probably had one or two customers in it at the time; that Johnson did not come through the check line; that at the time she was waiting for a customer to sign a check and she was bagging; that Clauson, who works in the lobby department, was standing at her check stand "just visiting" and Cook, who was bagging at all of the check stands, walked by; that she asked Cook if she wanted to sign the petition and she did; that Weaver came over and she told Weaver that she

needed \$1 bills; that Weaver asked what the document on the clipboard was and she told Weaver that it was a petition; that she told Weaver that she could look at it; that Weaver picked it up and she looked at it and then said, "You can't be doing this on the clock. It's against company policy"; that Weaver took the petition with her and made photocopies of it in front of customer service; that a few minutes later she asked Weaver if she could have it back and she would put it in her locker; that Weaver said no it was in the courtesy booth; that later that same evening she asked several more times for the petition; that when she went on break she asked Mehrer if she could have it and Mehrer said that she did not know where it was but she thought it was in the safe; that when she returned from break Weaver told her that "Dan [Yeazel] said that I could not have it on the sales floor at any time, only on off the clock hours and in the breakroom and that I could have it when I got off work, and I was told that it was locked in the office upstairs"; and that in the past Yeazel had come to her check stand and gave her information for the United Way fund and asked her to donate to it.<sup>10</sup> On cross-examination, she testified that she was aware that Wehner's petition had been filed 2 months before Johnson gave her the petition; that she was dealing with customers and talking with Clauson and Cook; that she told Weaver that she could look at the petition which was laying on the check stand but Weaver took the petition; that there was one name on the petition when Weaver took it; and that she obtained another signature after she was given the petition back but she stopped obtaining signatures in view of the fact that other employees had circulated their petitions. Subsequently she testified that she did not believe that her receiving the petition from Johnson interfered with her service of customers; and that she gave the petition back to Johnson.

Johnson testified that on a day in mid-September 1995, about 4 p.m. he entered the involved store, and did the following:

I . . . walked to the customer side of the register and . . . around back behind the register, saw Pesek and I said "I've got this for you, Dianne. You know what to do with it." I laid the clipboard down. She took a look at it and I said "You know what to do" and I left. And I exited the store immediately.

Johnson further testified that he did not come through Pesek's line with groceries; that there were a couple of customers in her line and he came up behind her and waited until there was a stop in her transaction—the customer was getting money or writing a check—before speaking to her; that he visits with employees in the involved store on the

<sup>9</sup> At the time Weaver was the supervisor in charge of the entire store since Yeazel was not there.

<sup>10</sup> Pesek testified that about 1-1/2 to 2 years before she testified herein (July 23, 1996), she brought a petition to the store to stop year-round school in Rapid City. She kept that petition in her pocket and circulated it in the breakroom. One Sunday night when the store was not busy one of the checkers standing down on the front end asked her if she had the petition. Pesek gave the checker the petition and the woman took it, signed it, and returned it to Pesek. Pesek testified that there were no customers around and it was not busy at all; that within 5 minutes of receiving the petition back Grocery Manager John Binger, who was Randy Stewart's predecessor, told her, "[Y]ou cannot do that on the sales floor"; and that Binger also said that it was against policy and she could not do it downstairs, she could not do it on the clock.

floor and in the breakroom, between once every 2 to 3 days and once every 2 weeks depending on what was happening; and that none of Respondent's supervisors has asked him to leave the store.<sup>11</sup> On cross-examination, Johnson testified that he was not an employee of Respondent; that in the charge he filed on August 9, 1995, in Case 18-CA-13715, it is alleged that "[t]he Employer has violated the Act by assisting in the circulation of a decertification petition"; that he believed that the language he used in the charge includes the assertion that management violated Respondent's solicitation policy; that while Wehner filed his decertification petition 2 months before he gave Pesek the petition to get signatures, it was his understanding that Wehner could withdraw his petition at any time; that there were two maybe three customers at Pesek's check stand when he gave her the petition; and that one of the reasons that he goes to Respondent's store is to talk to the employees about the Union and occasionally he does this while the employee is working.

Yeazel testified that on September 15, 1995, he received a telephone call from Weaver between 6:30 and 7:30 p.m.; that Weaver said that there was an incident at Pesek's check stand with several employees huddled around; that Weaver said that Pesek gave her the petition and she took it to the courtesy booth and made a copy of it and kept it; and that he told Weaver to return the petition and the copy to Pesek and tell her that the daily business could not be interrupted with this kind of activity. On cross-examination, Yeazel testified that there are times when Weaver and Steve Ralston would be the only managers in the store.

Weaver testified that on September 15 Mehrer came into the courtesy booth with some pickups and issues, which is the money that is taken from the checkers when they are given more change, and she told her that something was going on at Pesek's check stand; that when she looked she saw Pesek with her back to her customers and she was speaking with the employees; that Johnson was two or three people back in the customer line; that the two courtesy clerks left; that the 15 or less items express checker does his or her own bagging; that the two courtesy clerks interfered with Pesek's work because she was talking to them; that Pesek had ordered \$1 bills and she, Weaver, brought them over to Pesek; that by that time the line had dwindled down because Mehrer opened a check stand behind Pesek; that she asked Pesek what she had and Pesek replied a petition; that Pesek said "do you want to see it"; that she picked up the petition, looked at it and then said, "Dianne, I'm not sure you can have this on the sales floor"; that she took the petition to the courtesy booth and she telephoned Yeazel twice before reaching him; that when she did not reach Yeazel the first time she spoke with Ralston who told her to make a copy of the petition and put it in the safe; that Yeazel told her to give Pesek the petition and the copy which Weaver made of it and tell Pesek that she is not to interfere with anyone while they are working; and that when she relayed Yeazel's message to Pesek she said that she did not want the petition back and she would get it back when she was done with work. On cross-examination, Weaver testified that generally when there are three or four people standing in line another check stand is opened up.

<sup>11</sup> Before the election Yeazel invited Johnson to address Respondent's employees while they were on the clock. Johnson accepted.

By letter dated September 20, 1995 (R. Exh. 2), the Regional Director for Region 18 of the Board advised Tom Johnson, president of the Union, that the charge in Case 18-CA-13715 had been carefully investigated and considered. The letter goes on to indicate as follows:

As a result of the investigation, it appears there is insufficient evidence to establish the Employer violated the Act, as alleged. The investigation established that from July 18 through July 21, 1995, two employees circulated a decertification petition among employees of the Employer, that several supervisors were requested to and signed the petition; and that one of the employees who circulated the petition may have violated the Employer's solicitation policy with the knowledge of some supervisors and without being disciplined. The investigation failed, however, to establish that under the circumstances, including the absence of evidence of disparate enforcement of the Employer's no solicitation policy at any time material to the circulation of the petition, that the Employer illegally assisted in the circulation of the decertification petition. Additionally, the mere signing of the petition by several supervisors under the circumstances does not constitute unlawful assistance.

The letter went on to explain how to appeal this finding.<sup>12</sup>

By letter dated October 18, 1995, General Counsel's Exhibit 3, the Office of Appeals of the National Labor Relations Board (the Board) in Washington, D.C., acknowledged receipt of the Union's appeal in Case 18-CA-13715.

By letter dated November 9, 1995, General Counsel's Exhibit 4, the Regional Director for Region 18 advised the Union as follows:

A dismissal letter issued in the above-captioned matter [18-CA-13715] on September 20, 1995. On October 2, 1995, the Charging Party filed a charge in Case 18-CA-13782 wherein it alleged that the Employer on or about September 15, 1995, violated the Act by disparately enforcing its solicitation policy. Additionally, on November 2, 1995, the Charging Party filed a charge in Case 18-CA-13825 wherein it alleged that the Employer has discriminated against an employee because of her support for the Charging Party and for giving statements to the NLRB by engaging in surveillance and interrogation and by harassing and intimidating her in violation of her rights guaranteed under Section 7 of the Act. [This was one of the cases settled at the outset of the hearing herein.] On October 16, 1995, the Charging Party timely filed an appeal of my dismissal in this matter [18-CA-13715]. The Region has now concluded that there is merit to the charges in Cases 18-CA-13782 and 18-CA-13825. In addition, the evidence adduced during the investigation of those matters warrants a reconsideration of my dismissal in Case 18-CA-

<sup>12</sup> Yost testified that during the investigation of the circulation of the decertification petition he told a Board agent that he, Yost, "after talking with . . . [Yeazel], . . . [was] not aware of anybody circulating . . . [the decertification petition] in work areas on worktime and therefore . . . [Respondent] didn't believe that there was any violation of the solicitation policy."

13715. Accordingly, the dismissal letter which issued in the above-captioned matter on September 20, 1995, is hereby revoked, and the Region will resume further processing of this matter.

#### B. Analysis

Paragraph 5(a) of the complaint alleges that Respondent violated Section 8(a)(1) of the Act in that since July 18, 1995, it has disparately enforced its no-solicitation policy and thereby assisted employees in filing a decertification petition by permitting antiunion solicitations by employees in violation of company rules while prohibiting prounion solicitations. On brief, the General Counsel contends that the baseline employer policy regarding in-store solicitation is established by the testimony of Dahl; that with Dahl the Employer made no distinction based on customer inconvenience; that the Employer's published policy on solicitations was ignored or relaxed for Wehner's ubiquitous decertification effort; and that such inaction broadcasts a message that the Employer is "in effect outwardly encouraging and endorsing" the decertification effort, *Waste Stream Management*, 315 NLRB 1099, 1122 (1994). The Charging Party, on brief, argues that Wehner's testimony should be disregarded since Wehner was not a credible witness; that Wehner's testimony even contradicted the testimony of Respondent's supervisors who testified herein; that the evidence shows that on other occasions the Company stopped employees from soliciting signatures on petitions or union authorization cards even when the employees were not causing work disruptions; that the Company has never considered that there was an exception to the literal wording of the solicitation policy which would allow employees to solicit on worktime so long as they were not interrupting employees' work or interfering with customer service; that the Company only came up with this theory to attempt to create a defense after the second charge was filed in this case; and that the Company is now taking the position that employees can circulate a petition during worktime under some circumstances. Respondent on brief argues that even though Wehner's testimony is not entirely consistent with the testimony of Mehrer, Stewart, or Bachman, at most two or three solicitations may have taken place in the store during working hours; that Pesek testified that Wehner did not interfere with her work when he approached her;<sup>13</sup> and that the General Counsel failed to present any evidence that Respondent permitted any solicitations from Wehner that disrupted work production or customer service.

The above-described testimony of Dahl is credited. He impressed me as being a credible witness. He was very detailed in his testimony. On the other hand, Yeazel did not impress me as being a credible witness. His denial of what occurred with Dahl was general. More than once during the trial herein Yeazel was contradicted by credible witnesses and documentation. Binger did not testify herein. Consequently, Pesek's testimony that a manager told her that she could not

circulate a petition on the sales floor even when there were no customers around and it was not busy is credited. Therefore, even before September 15, 1995, Respondent did not allow the solicitation of signatures in work areas on worktime. And Respondent's expressed position was not based on customer or employee disruption.

Regarding the decertification petition, Yost, in his July 12, 1995 letter to Wehner spelled out Respondent's position, namely, "[e]mployees must circulate the petition . . . in non-working areas (i.e., breakroom, outside of store) during non-working time. Supervisors cannot be involved." And Yost in later discussing the matter with a Board agent indicated, according to Yost's own testimony, that he, Yost, "after talking with . . . [Yeazel], . . . [was] not aware of anybody circulating . . . [the decertification petition] in work areas on work time and therefore . . . [Respondent] didn't believe that there was any violation of the solicitation policy." Wehner appreciated his situation for he testified that there was no petition signing while he was on the clock and he gave an affidavit to the Board in which he indicated that he was careful not to approach people who were on the clock.<sup>14</sup> Both of Wehner's statements under oath are false. He solicited signatures while he was on the clock. He solicited signatures while those whose signatures he solicited were on the clock. At least seven times, according to the record herein, he had conversations about signing the decertification petition while he, Wehner, was on the clock. More that once the petition was signed while Wehner was on the clock. Management knew of Wehner's activities. Indeed, some of those whose signature he solicited while he, they, or both were on the clock were managers. One of Respondent's managers was even told to sign the decertification petition by his superiors. Murphy's testimony is credited.<sup>15</sup> Stewart, who with Yeazel, told Murphy that he should take a break and go out and sign the decertification petition did not testify on this point to deny that such a conversation occurred.<sup>16</sup> Yeazel, who denied telling Murphy that it was okay for him to sign the decertification petition is not, as noted above, a credible witness. Even without considering what occurred on September 15, as described above, in my opinion Respondent violated the Act as alleged in paragraph 5(a) of the complaint. When one takes into consideration what oc-

<sup>14</sup> Bachman's and Pesek's testimony is credited regarding the circumstances of Wehner soliciting their signatures. Regarding the latter, Wehner undoubtedly knew that Pesek supported the Union. He impressed me as being the type of individual who nonetheless would discuss this matter with Pesek. The testimony of Stewart and Mehrer is also credited on this point. It is noted that Stewart did not deny that he was working as a checker the day in July 1995 when Pesek, who at the time was out on maternity leave, came into the store, and that this normally means that the store is busy.

<sup>15</sup> This finding takes into consideration the situation which existed at the time of the hearing herein regarding Murphy's discharge. He impressed me as being a credible witness. His testimony was detailed. It is noted that when his signature was solicited he was waiting on customers.

<sup>16</sup> It is noted that Stewart answered, "[n]o," when asked, "[d]id you ever talk to any employees that you supervised to encourage them to sign a petition for Mr. Wehner?" (Emphasis added.) Murphy was a supervisor and not in the involved unit, and, as noted above, Anderson solicited his signature.

<sup>13</sup> It appears that there is a misunderstanding of the record here in that Pesek was on maternity leave when, according to her testimony, Wehner asked her to sign the decertification petition. Albeit Wehner denied soliciting her signature, he did not specifically deny Pesek's testimony regarding when this conversation took place. And even if he had, I would not credit his testimony for, as indicated below, I find Wehner to be a totally unreliable witness.



curred on September 15, 1995, I do not doubt that Respondent violated the Act as alleged in this paragraph.

Paragraph 5(b) of the complaint alleges that on or about September 15, 1995, Respondent violated the Act by engaging in surveillance of employees' union activities by confiscating prounion materials from employees and copying them. The General Counsel, on brief, contends that while Weaver is not alleged in the complaint as either a supervisor or an agent of the Employer, she acted at all material times as an agent, and there is little question that she was in fact a supervisor; that Mehrer directed Weaver to go find out what was going on at Pesek's check stand; that Mehrer ratified Weaver's confiscation of the petition when, later in the shift, Mehrer refused Pesek's request for return of the petition; that Pesek was told that she could not circulate her petition except in the breakroom during nonwork time; that Pesek was not told just to avoid customer interference; that if Employer's motivation was purely to avoid customer interference, there was no reason to confiscate or copy the petition Pesek had; that without evidence of actual disruption, the inference of disparate treatment remains, *Union Day Care Center*, 304 NLRB 517, 524-525 (1991); that the burden should be on the employer to justify its restriction on protected activity by objectively demonstrating that Pesek's actions interfered with customer service and good faith and pure motive are no excuse, *NLRB v. Burnup & Sims*, 379 U.S. 21 (1962); that Weaver's and Mehrer's testimony about customer interference was their subjective, post hoc spin on a nonincident, developed to try to beat this charge; that the 20 seconds which Mehrer described is the time it would have taken a customer to write a check; and that this is what Pesek testified the customer was doing; and that this is inconsistent with the assertion that customers were interfered with. The Charging Party, on brief, argues that, by confiscating the prounion petition from Pesek and then photocopying it the Company engaged in actual surveillance of union activities and also created the impression of surveillance. Respondent contends on brief that "[a]t Pesek's request, Weaver took the clipboard, made a copy of it, and kept it at the customer service booth";<sup>17</sup> and that "Pesek stated that Weaver could take it [the petition]."<sup>18</sup>

What Respondent contends regarding the events of September 15, 1995, is not accurate. Respondent's involved supervisors, especially Weaver, did not testify that Pesek requested Weaver to take the clipboard, make a copy of it, and keep it at the courtesy booth. Pesek merely told Weaver that she could look at the petition. From that point in time forward what Weaver did with the petition was not at the behest of Pesek. As contended by the General Counsel, Weaver was a supervisor at the time. Yeazel testified that his November 1995 affidavit indicates that Weaver was among the top five managers; that she has higher authority and more responsibility than Mehrer, an admitted supervisor; that Weaver is authorized to give directions to Mehrer; and that there are times that Weaver and Ralston are the only managers in the store and at those times they are responsible to direct the entire work force. Weaver is a supervisor as that term is defined in the Act. Additionally, Mehrer, as pointed out by the General Counsel, ratified Weaver's actions in refusing Pesek's

request for the return of the petition. Mehrer's testimony was not candid with respect to, as here pertinent, two things. Mehrer testified that she just came back from lunch when she noticed the "commotion" and she spoke to Weaver about it. Weaver does not join Mehrer in this assertion. Rather, Weaver testified that when Mehrer came into the courtesy booth and told her about Pesek, Mehrer had some pickups and issues, which is the money that is taken from the checkers when they are given more change. Obviously, Mehrer was not just returning from lunch. Weaver did join in the assertion that Johnson was standing in Pesek's customer line. Both Johnson and Pesek testified that he did not stand in her customer line. They are credited. Why would Mehrer and Weaver advance the assertion that Johnson was on the line? If Johnson was on the line waiting to give the petition to Pesek, how could Cook sign it and return it to Pesek while Johnson was still on the line? And why would Mehrer testify that she was just returning from lunch when she spoke to Weaver about Pesek? The heart of the matter is who saw what when. At some point in time Mehrer became aware of the fact that there might be a question of surveillance. In my opinion while Mehrer was making her pickups and issues she saw Johnson hand the clipboard to Pesek, Mehrer saw Cook sign whatever was on the clipboard and Mehrer saw Cook return the clipboard to Pesek. Mehrer and Weaver wanted to know what was on that clipboard. That is why Weaver asked Pesek what she had. Mehrer testified that the whole incident lasted maybe a good 20 seconds. It appears that there were about two customers on Pesek's line at the time. It was not demonstrated that they were inconvenienced in that the 20 seconds was apparently the time it took for one of the customers to write out a check. Albeit Weaver testified that Cook and Clauson interfered with Pesek's work, there is no indication that management said anything to either of them about this matter.

The circulation of the decertification petition in work areas during worktime is covered above. If management was allowing it based on some unwritten and heretofore unspecified policy, then the employees were not aware. But certainly those who wanted to circulate a prounion petition expected the same treatment as those who circulated the decertification petition. Since the decertification petition was circulated out in the open in work areas during worktime, it appears that those who wanted to circulate the prounion petition believed that they too could circulate their petition out in the open in a work area during worktime. It was not to be, however. Management wanted to know what it was that was being circulated. When Pesek was asked what it was she had no real choice but to tell Weaver. Once management found out what it was the petition was confiscated, copied, and locked in a safe. This occurred in the front of the store during a busy period. The Respondent violated the Act as alleged in paragraph 5(b) of the complaint. In allowing the open circulation of the decertification petition in work areas on worktime and then subsequently asking Pesek, who was doing the same thing, what she was circulating, and then confiscating and copying it, the Respondent, in my opinion, engaged in surveillance.

Requests for the return of the petition were initially met with denials. Pesek was not told when she said that Weaver could look at the petition that under Respondent's unspecified policy which had been in effect since the decertification

<sup>17</sup> See p. 13 of R. Br.

<sup>18</sup> Id. at 23.

petition had been circulated that it is alright to solicit signatures during worktime in work areas so long as customers or employees who are working are not disturbed. When Pesek's petition was confiscated, copied, and locked away Pesek was told, "[y]ou can't be doing this on the clock. It's against company policy." Yeazel testified that he told Weaver to tell Pesek that "we can't interrupt daily business with this kind of activity." From this Weaver, according to her testimony, was able to tell Pesek "she could have the petition back but she wasn't to interfere with people while they were working." Pesek is credited. When Weaver told her she could have the petition back Weaver said that Pesek could not have it on the sales floor at any time, only on off the clock hours and in the breakroom. The Pesek petition was treated disparately vis-a-vis the decertification petition both when it was confiscated and when it was returned. Respondent had not changed its policy. Respondent rather accorded the decertification petition special treatment. Respondent violated the Act as alleged in paragraphs 5(a) and 5(b) of the complaint.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by disparately enforcing its no-solicitation policy and thereby assisting employees in filing a decertification petition by permitting antiunion solicitations by employees in violation of company rules while prohibiting prounion solicitations, and by on or about September 15, 1995, engaging in surveillance of employees' union activities by confiscating prounion materials from employees and copying them.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>19</sup>

#### ORDER

The Respondent, Albertson's, Inc., Rapid City, South Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disparately enforcing its no-solicitation policy and thereby assisting employees in filing a decertification petition by permitting antiunion solicitations by employees in violation of company rules while prohibiting prounion solicitations.

<sup>19</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Engaging in surveillance of employees' union activities by confiscating prounion materials from employees and copying them.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after the service by the Region, post at the facility in Rapid City, South Dakota, copies of the attached notice marked "Appendix."<sup>20</sup> Copies of the notice on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of this proceeding, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees employed by the Respondent at any time since August 9, 1995.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

<sup>20</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT disparately enforce our no-solicitation policy and thereby assist employees in filing a decertification petition by permitting antiunion solicitations by employees in violation of company rules while prohibiting prounion solicitations.

WE WILL NOT engage in surveillance of employees' union activities by confiscating prounion materials from employees and copying them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act.

ALBERTSON'S, INC.